SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 167

BANCO CREDITO Y AHORRO PONCENO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO THE MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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On June 19, 1968 the Solicitor General filed a Memorandum for the National Labor Relations Board in Opposition to the petition for certiorari. The opposition was not addressed to the merits of the petition, but was directed solely to the fact that the petition had been filed a single day after the ninety days provided for in 28 U.S.C. § 2101.

The sole reason why the petition was filed on June 6, 1968 rather than June 5, 1968 was that, despite the most careful checking and rechecking, counsel for petitioner made an inadvertent error in computation of the ninetieth day after the entry of the decree in this case. Section 2101(c) authorizes extensions of time to be granted by a single Justice "for good cause shown" for up to sixty days. The statute does not prescribe that applications for extension of time must be filed before the ninetieth day. The Memorandum in Opposition notes that "no timely extension of time was sought . . ." (p. 1). In a situation such as here, where it was believed, based on an inadvertent error in computing the time, that the petition was being timely filed, there was, of course, no occasion or opportunity for filing an application for extension of time before the due date.

This question is not jurisdictional. Nothing in Section 2101(c) precludes the Court from granting, *nunc pro tunc,* an extension of one day's time for filing a petition for certiorari where the due date was not met because of an inadvertent error in computation.

The governing statute authorizes the Court to extend the time for filing for sixty days beyond the original ninety-day period. The statute reads in pertinent part, as follows:

> "Any other appeals or any writs of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Since the statute authorizes extensions of time beyond the original ninety days, it appears plain that the ninety-day provision is not jurisdictional. Nor does the statute require that a request for time extension be filed within the original ninety-day period. On the contrary, the general and unrestricted authority to grant a time extension strongly suggests that the Court may in its discretion and for "good cause" shown extend the period either before or after the expiration of the original period.

The Court rules do provide that requests for time extensions should be made at least ten days before the end of the original filing period but permits their consideration even if made during the last ten days. But, this is not statutory and is subject to reasonable interpretation to prevent manifest injustice. Where as here, it was believed in good faith that the petition was being filed within the original ninety-day period, this provision of the rule can have no practical application.

The statutory power to enlarge the filing time should, in order to prevent manifest injustice, be construed to authorize in the Court's discretion a one day extension of time granted on a *nunc pro tunc* basis where there is no claim or showing of prejudice to the respondent. The same "considerations of liberality and leniency" which moved this Court in *Union National Bank of Wichita, Kansas* v. *Lamb,* 337 U.S. 38, to permit the filing of an appeal on the ninety-first day after the judgment of the Supreme Court of Missouri (since the ninetieth day fell on a Sunday) show that the question is not jurisdictional and should move the Court to consider the present petition on its merits. The *Lamb* case itself indicates that this issue is not preempted by the

statute and that the Court does not consider itself as irrevocably bound to the literal time limitations specified in its rules as the Solicitor General's Memorandum appears to argue.

For the foregoing reasons the petitioner respectfully requests the Court to extend the time for filing petitioner's brief to June 6, 1968 and to direct respondent to respond to the petition on its merits.

Respectfully submitted,

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